

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL

77-4115

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERCONEX, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND THE UNITED STATES OF
AMERICA,

Respondents.

Docket No. 77-4115

REPLY BRIEF OF PETITIONER, INTERCONEX, INC.

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DALE C. ANDREWS
Galland, Kharasch, Calkins & Short

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This brief is filed by Petitioner, Interconex, Inc. (hereinafter "Interconex") in reply to the briefs of Respondent, Federal Maritime Commission (hereinafter "FMC" or "Commission") and Intervenor, Sea-Land Service, Inc. (hereinafter "Sea-Land"), pursuant to Rule 28(c) of the Federal Rules of Appellate Procedure. Reply arguments are raised in the order presented by the FMC and Sea-Land.

II. ARGUMENTS RAISED BY THE FMC

1. In many cases before this Court, opposing counsel have looked at the same factual situation and drawn different characterizations of the events in question. Opposing counsel in the instant case are no different. They have submitted briefs with contrasting characterizations of the course of litigation before the Commission in FMC Docket No. 75-24,^{1/} a complaint by Colt Industries Operating Corp. (hereinafter "Colt") against Interconex, a nonvessel operating common carrier by water (NVOCC) and three underlying ocean carriers, American Export Lines, Inc. (AEL), United States Lines, Inc. (USL) and Sea-Land, and FMC Docket No. 75-19,^{2/} Interconex's complaint against those underlying carriers.

Interconex believes that it filed a complaint before the FMC providing proper notice to all respondents, but that the FMC tested the adequacy of the complaint on the basis of rigid formalistic common law pleading concepts, and refused to hear the merits of Interconex's claims against the underlying carriers in violation of the Administrative Procedure

^{1/} Hereinafter cited as "75-24". The complaint initiating this case hereinafter is cited as "the Interconex complaint".

^{2/} Hereinafter cited as "75-19". The complaint initiating this case hereinafter is cited as "the Colt complaint".

Act (5 USC §500, et seq.). The FMC, on the other hand, characterizes Interconex as seeking to litigate issues beyond its jurisdiction by bending the FMC procedural rules to suit its purposes.

When the FMC describes the filing of the Interconex complaint,^{3/} it attempts to lay the groundwork for its characterization of that complaint and the course of litigation:

"On June 25, 1975, however, Interconex filed a complaint, which it characterized as '...a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure...'. Respondent's Brief (hereinafter "Resp. Br.") at 4.

Interconex did not say that its complaint was filed as a cross-claim against co-parties. From the outset, it recognized that the FMC had no third-party practice rules, and did not attempt to engraft its complaint against the underlying carriers onto the proceeding in 75-19. Instead, it filed a complaint initiating a proceeding separate from that case.^{4/}

3/ At times, the FMC refers to this proceeding as FMC Docket No. 75-25 (e.g. Resp. Br. at 5). Interconex believes that such references are due to clerical error on the part of the FMC, and that it intended to refer to FMC Docket No. 75-24.

4/ The filing of the Interconex complaint in a separate proceeding distinguishes this case from MacMillan Co. v. United Cargo Corp., 11 SRR 1143 (Init. Dec. 1970) cited by Intervenor, Sea-Land as a footnote to page 4 of its brief. MacMillan is also distinguishable in that the underlying carriers which the NVOCC sought to implead were not named as respondents in the original complaint.

Interconex's claim was against co-respondents in 75-19 and was contingent upon its refunding freight charges to Colt "in consequence of the Colt complaint in Docket 75-19."^{5/} Interconex believed that it would enhance the notice-giving effect of its complaint by inserting a parenthetical phrase noting the analogy between the procedural device available under the FMC rules of practice (a complaint initiating a separate proceeding) and the procedural device which would have been available had the action been before the federal courts (a cross-claim in the same proceeding).^{6/}

2. The FMC contends that it has statutory authority to award reparation to shippers injured by a carrier's overcharge, but "not to adjudicating offsets, claim liability, counter claims or cross claims on shipments between multiple carriers." Resp. Br. at 7. As recognized by counsel for the FMC, Interconex operated as an NVOCC with respect to the shipments in question; thus, it acted as a shipper in tendering

^{5/} J. App. No. 4 at 3. Surely Interconex could sue carriers who have been named as respondents along with it in a previous case, and FMC case law indicated that it would adjudicate contingent claims. See Petitioner's Brief (hereinafter "Pet. Br.") at 5-7.

^{6/} The exact wording of that portion of the complaint is as follows:

"Interconex therefore files this complaint (in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure) against the underlying carriers..." J. App. No. 4 at 3.

Colt cargo to the respondent-underlying carriers and as a carrier in relationship to its shipper, Colt. Id. at 4, n.2. The fact that the shipments were handled by multiple carriers -- an NVOCC and underlying carriers -- does not affect the right of Interconex, as a shipper, to seek reparation from the underlying carriers pursuant to section 22 of the Shipping Act.^{7/}

3. The FMC flatly misstates the facts when it states that "even before the settlement agreement with Colt and Korea had been concluded, Interconex was sued by Sea-Land for allegedly withholding certain freight charges on shipments included under the Colt complaint in Docket No. 75-19." Id. at 9. In fact, the settlement in 75-19 preceded the Sea-Land suit against Interconex in the Federal District Court for the Southern District of New York by more than ten months.^{8/}

4. According to the FMC, the validity of the Interconex complaint in 75-24 was tenuous, due to its claims against

^{7/} The FMC cites *Consolo v. FMC*, 383 U.S. 607 (1960) for the proposition that it does not have jurisdiction to order underlying carriers to return undercharges to shippers like Interconex. Resp. Br. at 13,14., n.13 and 21, n.21. Although Interconex does not contest this proposition, that case is equally good authority for the proposition that the FMC does have authority to order carriers to return overcharges to shippers.

^{8/} The FMC was notified of the settlement in 75-19 on April 28, 1976 (J. App. No. 31) and the Sea-Land suit was filed on March 18, 1977. See Interconex Motion to Hold Briefing Schedule in Abeyance, Ex. H. (filed September 15, 1977).

the underlying carriers being contingent upon its refunding freight charges to Colt in consequence of the Colt complaint in 75-19 (Id. at 12,13); and any validity was extinguished when Interconex settled with Colt as the price for avoiding a Colt appeal of the dismissal of 75-19. Id. at 17-21.

These arguments might have been relevant under old common law pleading standards where a plaintiff taking one misstep inside the courtroom quickly found himself on the street with the courtroom doors barred behind him. Under liberal pleading standards, such arguments are irrelevant and divert attention from the proper standard for testing the adequacy of the complaint -- whether the complaint afforded the parties with a generalized summary of the case made against them.^{9/}

The FMC concedes that the Interconex complaint did afford the parties "with a generalized summary of the case [and] notice of contingent claims made against them." Id. at 15. Moreover, it concedes that the liberal pleading standard, not the formal common law standard, is the proper test for the adequacy of complaints filed before it. Id. By those concessions, the FMC has shown that the Interconex complaint passes the test for adequacy when the proper

^{9/} See the authorities cited on pages 14-16 of Pet. Br.

grading standards are applied. By applying the wrong grading standard to flunk the Interconex complaint, the FMC abused its discretion and acted arbitrarily and capriciously in violation of the Administrative Procedure Act.

The FMC attempts to blunt the concession that its procedural rules generally incorporate liberal pleading standards by suggesting a double-standard: An FMC-drafted pleading or order which initiates a proceeding is adequate if it notifies the parties "of the matters of fact and law under inquiry" even if it is "not as exact as it might have been" (Unapproved Section 15 Agreement - Coal to Japan/Korea, 7 FMC 295,302, n.1 [1962]), or if it "contains a summary of the development of the problem." Imposition of Surcharge By The Far East Conference, 9 FMC 129,140 (1965). Private parties litigating disputes before the FMC, however "should be more closely bound by the classic rules of pleading." Resp. Br. at 15.

The FMC, itself, has applied the exact liberal pleading standards in cases initiated by private litigants which it now attempts to reserve to its own pleadings. For example, Stockton Port District v. Pacific Westbound Conf., 9 FMC 12 (1965), aff'd sub nom. 369 F.2d 380 (9th Cir. 1966), cert. denied 386 U.S. 1031 (1967), cited a previous case (City of Portland v. Pacific Westbound Conference, 5 FMB 118,129 [1956], aff'd sub nom. 257 F.2d 607 (D.C. Cir. 1958) cert. denied 358 U.S. 828 (1958) in holding that:

"...after a complaint is filed before the Commission, it becomes the duty of the Commission, to investigate the complaint and take proper action upon its own motion... its power is not restricted by the issues raised on the complaint, provided... that the (respondent)... had full opportunity to make (its) defense.

It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law." (Emphasis added) 9 FMC at 33.

There is absolutely no logical or equitable basis for the double-standard and any attempts to justify the FMC order on the basis of classical pleading standards should be summarily rejected.^{10/}

5. The FMC also attempts to dissipate the effect of its concession that the Interconex complaint provided a generalized summary of the case by citing Empire Truck U-Drive It, Inc., 96 MCC 29,17 ADL 2d 116 (ICC 1964) for the proposition that: the relevant question is whether "the underlying carriers were given '...reasonable assurance [sic] to learn the claims made against them and to meet them.'" Resp. Br. at 16.

In fact, Empire reinforces Interconex's position. In ruling that the respondent had received proper notice under

^{10/} The sole case cited by the FMC, FTC v. Gratz, 253 U.S. 421 (1920), involves the adequacy of notice by the agency and contains no hint that a double-standard is permissible.

section 5(a) of the Administrative Procedure Act, the ICC held:

"Section 5(a) guarantees respondents reasonable opportunity to learn the claims made against them and to meet them. A complete and precise bill of particulars is not required where a party is aware of the issues to be tried. There is sufficient notice if a respondent is generally apprised of the issues, and it is not necessary to inform it of every specific instance of unauthorized transportation to be presented. Dart Transit Co. v. Interstate Commerce Commission, 110 F. Supp. 876,879, aff'd 345 U.S. 980 (1953); and Pierce Auto Freight Lines Inc. v. Converse, 54 M.C.C. 447, 449-450. Clearly, respondents herein were given ample and fair notice prior to the hearing by informal communication from the Bureau's trial attorney to respondents and their attorneys. Respondents note no matters of substance raised at the hearing concerning which they can complain of surprise or inadequate notice. We consider, therefore, that the notice given respondents was fully in accordance with the requirements of law, and was not defective." 96 MCC at 37.

The Interconex complaint not only met the minimum standard, it exceeded that standard by providing detailed data for each shipment in dispute. By incorporating the Colt complaint in 75-19 into its complaint, Interconex identified the shipments in dispute, and for each shipment listed: the underlying carrier, the container number, the seal number, the name of the vessel, the port of loading, the date the cargo was shipped, the description of the commodity and other details of the shipments. See J. App. No. 1 at 10-58. In addition, the Interconex complaint informed the underlying carriers that if Interconex were to

refund freight charges to Colt in consequence of the complaint in 75-19, it would be entitled to a refund of freight overcharges from them.

Assuming arguendo that the Interconex complaint lacked all details necessary for the underlying carriers to defend against the Interconex complaint, the proper remedy was for the Judge to direct Interconex to state its case more fully and in more detail by way of amendment (46 CFR §502.70), not for him to dismiss the complaint. Where complaints have been found defective only as to questions of the appropriate remedy or as to technical matters not involving the substance or gravamen of the claim, the FMC, itself, has recognized that complainants should be given an opportunity to cure them. Heterochemical Corp. v. Port Line, Ltd., 14 FMC 228,229 (1971); Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 USSBB 308,311 (1934); Gillen's Sons Lighterage v. American Stevedores, 12 FMC 325,331, n.6 (1969). Dismissal of a complaint for failure to state details beyond a generalized summary of the case is all the more arbitrary and capricious when the complainant has provided all details available to it.^{11/}

^{11/} At the time Interconex drafted its complaint, Colt had not produced the back-up documents showing that certain cargo measurements had been overstated on Interconex's bills of lading (and on corresponding bills of lading prepared by the underlying carriers). Such documents were provided to Interconex only after it settled with Colt.

It is not clear whether Judge Harris' dismissal of 75-24 was with or without prejudice. Sea-Land suggests that it was with prejudice. Intervenor's Brief (hereinafter "Int. Br.") at 14. If so, the FMC position seems to be that a complainant before that agency who provides respondents with a generalized summary of the case, but does not provide full details of his claims, may have his complaint dismissed and be forever barred from refileing a complaint with the missing data before the FMC. In Interconex's opinion, this position reflects a very harsh and formalistic common law pleading test, not the liberal pleading standards which the FMC concedes are embodied in its own procedural rules. Resp. Br. at 15.

6. The FMC asserts that:

"It is fundamental that where a complaint and a cross- or contingent- complaint are based on the same transactions, ...there would be no right of recovery ...when the basic or underlying complaint is dismissed...".
Id. at 16-17.

The sole authority for that proposition, a 1949 Department of Agriculture case involving the Perishable Agricultural Commodities Act, was decided somewhat prior to the full flowering of liberal pleading standards. Even if that case could have been cited as authority for a "fundamental" concept in 1949, it has no precedential value under today's pleading standards.

Barker v. Louisiana & Arkansas Ry. Co., 57 FRD 489,491

(W.D. La. 1972) (Pet. Br. at 21) illustrates the present-day rule:

"[Rule (13)g] does not require that a previously interposed cross-claim be dismissed when, subsequent to the cross-claim, the original claim itself is dismissed or the plaintiff's claim against the co-party is dismissed." (Emphasis added).

See also Frommeyer v. L & R Construction Co., 139 F. Supp. 579, 585 (D. N.J. 1956); Pet. Br. at 22.

III. ARGUMENTS RAISED BY SEA-LAND

1. As noted by Sea-Land, the FMC Rules of Practice do not specifically incorporate the Federal Rules of Civil Procedure. Int. Br. at 4. The precedential value of federal pleading rules has long been recognized in FMC proceedings, however. See Chr. Salveson & Company, Ltd. v. Michigan Dock & Market Corp., 9 SRR 1154 (Init. Dec. 1968).

2. Contrary to Sea-Land's assertion, Interconex was not late in filing its replies to the motions to dismiss its complaint in 75-24. Int. Br. at 7. As conceded by the FMC, they were filed on the due date -- August 6, 1975. Resp. Br. at 6, n.6. Although Administrative Law Judge Harris may not have read those replies before writing his original order dismissing the Interconex complaint, the Secretary of the FMC provided Judge Harris with notice of his receipt of those documents on August 7, 1975 (J. App. No. 16), one day

after the deadline and one day before Judge Harris completed drafting his order. See J. App. No. 19 at 1.

3. Sea-Land is correct in asserting that Interconex notified the FMC that:

"Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot -- in which case the ICX complaint can be dismissed or withdrawn."
Int. Br. at 9.

There were several possibilities for the Colt case against Interconex to be decided in a way which rendered the Interconex complaint moot:

- Colt and the Republic of Korea could have given Interconex an unconditional release from claims relating to shipments covered by 75-19 without requiring anything from Interconex in return.
- The underlying carriers could have contributed to the settlement with Colt and the Republic of Korea in return for a release from Interconex and those parties.
- Interconex could have fought the appeal of Judge Harris' dismissal in 75-19 which Colt would have brought in the absence of a settlement agreement and won (and also prevailed in all appellate proceedings before the Commission and the courts).

None of those events occurred. Instead, Interconex refunded a portion of the freight refunds claimed by Colt in 75-19 by way of settlement agreement in order to avoid the prospect of Colt successfully appealing Judge Harris' dismissal of the Colt complaint.

4. In section I(f) of its brief, Sea-Land urges this Court to narrow the scope of its review of the order in 75-24 in deference to Judge Harris' order in 75-19. Under this

theory: Judge Harris' order in 75-19 became the decision of the Commission when Interconex decided to settle with Colt as the price for avoiding what it thought would be a successful appeal. When Interconex appealed the dismissal of its complaint in 75-24, the Commission was required to search its previous decisions to find applicable precedent. Upon finding Judge Harris' decision in 75-19 that the FMC could not entertain the Colt case, the Commission became inexorably bound to rule that it could not entertain the Interconex complaint in 75-24. The Sea-Land theory concludes with the proposition that, since the Commission decision in 75-24 is consistent with precedent on the books of the FMC, this Court has little or no power to set aside that order. Int. Br. at 11,12.

First, our response concerning the power of the FMC. The FMC is not bound to follow previous decisions rendered by the Commissioners with iron rigidity,^{12/} much less the decisions of Administrative Law Judges which have become decisions of the Commission by default.

On the second issue -- the power of this Court to set aside the FMC order -- the Sea-Land theory for using Judge

^{12/} Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292, 1299 (D.C. Cir. 1975); FTC v. Crowther, 430 F.2d 510, 513 (D.C. Cir. 1970).

Harris' order in 75-19 to tie the hands of this Court is stretched far beyond the breaking point. This Court is required to enforce the provisions of the Administrative Procedure Act prohibiting abuses of discretion and arbitrary and capricious acts on the part of federal agencies. It is not precluded from setting aside an arbitrary and capricious order of the FMC on the ground that that order is consistent with a previous arbitrary and capricious order issued by an Administrative Law Judge of that agency.^{13/}

5. Sea-Land takes issue with Interconex's statement that the FMC did not advise it that settlement of the Colt complaint might affect the validity of its complaint, stating that petitioner has cited no authority "requiring an administrative or judicial tribunal to inform the parties of its decision in advance of its issuance." Id. at 13. Interconex did not berate the FMC for failing to announce its decision in advance; it made that comment to indicate a way in which the FMC could have avoided a transgression of the principle that:

"[I]t is too late for an Agency to declare the standards to be met by its decision holding that they have not been met." Hill v. FPC, 335 F.2d 355, 356 (5th Cir. 1964); See Foman v. Davis, 371 U.S. 178, 181-82 (1962). Pet. Br. at 28.

^{13/} The statement in Consolo v. FMC, supra, at 620-21 (1966), that "it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency" was made with respect to the standard of review for setting aside agency decisions allegedly unsupported by substantial evidence. Id. at 619. In this case, the FMC never used its special maritime expertise to weigh the evidence.

The standard that contingent complaints cannot survive the dismissal of an underlying complaint in a related case was established for the first time in the Commission order in 75-24. Assuming arguendo that that standard is lawful, one way in which the FMC could have established it in time to apply it against Interconex was to publish procedural rules implementing that standard prior to the settlement in 75-19. In that way, it could have provided timely notice to Interconex.^{14/}

It is clear that the FMC announced the standard too late for it to be applied against Interconex. Its ruling on the demise of contingent complaints upon the settlement of underlying complaints should have been prospective.

Sea-Land then suggests that the USL motion to dismiss Interconex's appeal (J. App. No. 34) provided Interconex with timely notice that settlement of the dispute in 75-19 would prejudice its claim in 75-24. Int. Br. at 13-14. This argument is deficient in two respects. First, FMC standards are not imposed by litigants before the agency, but by the agency in the proper exercise of its legislative or judicial powers under the Administrative Procedure Act.

^{14/} There may have been other methods for the FMC to provide adequate notice of that standard. The FMC Secretary's unauthorized rejection of the Interconex complaint (Resp. Br. at 12) on the general ground that the FMC had no power to adjudicate contingent complaints (as opposed to the Commission ruling in 75-19 that contingent complaints lose their validity on the settlement of the underlying claim) did not provide adequate notice of the standard.

In any event, the USL arguments on standards for dismissing contingent complaints when the original action is dismissed were not filed in time for Interconex to meet those standards. That motion was filed on August 6, 1976, more than three months after the execution of the settlement agreement in 75-19. J. App. No. 34; J. App. No. 31.

6. Arguments contained in Point II of Sea-Land's brief (pages 16-23), primarily relate to the merits of Interconex's claim. Interconex looks forward to arguing the merits of its claim; but this is not the proper forum for such arguments, as the FMC order appealed herein upheld the dismissal of the Interconex complaint on procedural grounds. Several arguments raised by Sea-Land raise such fundamental issues concerning the propriety of the Interconex claim that they must be addressed, however.

Counsel for Sea-Land argues that, in all probability, the Republic of Korea, not Colt, was the proper complainant in 75-19, and that Interconex's settlement of that case, therefore, must be considered as gratuitous. The fact that any resulting jurisdictional defects were corrected by amendment (Int. Br. at 17) does not phase Sea-Land, although that amendment had a very definite bearing on Interconex's decision that the Commission would likely overrule Judge Harris' decision in 75-19 if it did not forestall that appeal by

settling the dispute.^{15/}

Whatever the merits of the arguments as to the proper party in interest, it is clear that the settlement was "in consequence of the Colt complaint" (J. App. No. 4 at 3), and that Interconex insured that it would settle with the real party in interest by requiring both Colt and the Republic of Korea to join in the settlement. J. App. No. 31.

7. When Sea-Land argues that it "should not be taxed because petitioner saw fit under the circumstances to bite the bullet" (Int. Br. at 18), it misstates the crucial issue concerning the effect of the settlement agreement. The issue is not whether Sea-Land should be prejudiced by the settlement. Interconex has never contended that the settlement agreement provides conclusive proof that Sea-Land freight charges to Interconex were based on overstated cargo measurements; it is prepared to prove that the measurements were overstated to the satisfaction of an FMC Administrative Law Judge.

Interconex settled with Colt after reviewing Colt documents showing that cargo measurements had been overstated on Interconex bills of lading (and on corresponding bills of lading issued by the underlying carriers) and finding FMC

^{15/} It is interesting to note that this argument comes from the same law firm that represented Colt in filing its complaint and negotiating the settlement. Int. Br. at 2.

precedent that Colt was entitled to reparation even if it were to blame for misdeclaring cargo measurements. See Pet. Br. at 12, n.12. If it turns out that those documents are not sufficient to convince the Judge that cargo measurements were overstated, Interconex will not be able to claim that its settlement with Colt established the missing facts in its favor.

The real question is not whether Sea-Land is to be taxed because Interconex settled with Colt when it became convinced that Colt had a meritorious claim, but whether Interconex should be taxed by that settlement. Interconex believes that important public policy favors the out-of-court settlements of disputes, and that it should not be precluded from proving its claims against Sea-Land as a consequence of furthering that policy.

8. Sea-Land attempts to capitalize on the difference between Colt's allegations of fraud against Interconex and the absence of that term from Interconex's appellate vocabulary. Int. Br. at 20,21. Interconex will refrain from commenting on Colt's ease in using the term, but will point out that it found no substance to that allegation. It settled with Colt upon finding FMC case law holding that it would be required to refund freight charges to Colt even if Colt were at fault in declaring cargo measurements greater than the actual measurements.

As for Interconex, it does not use that term loosely. When and if Interconex detects fraud on the part of Sea-Land

through discovery procedures or examination of Sea-Land witnesses, that term will play a more prominent role in its vocabulary.

9. Finally, Sea-Land argues that amendment of the Interconex complaint would not remove the infirmities contained in the original complaint. Id. at 24. Although Interconex does not believe that its original complaint was infirm, it now has the ability to file an unconditional complaint against Sea-Land with a detailed analysis of all shipments handled by Sea-Land and the freight overcharge on each. Interconex suggests that the best way to find out whether or not an amended complaint would be infirm is for this Court to remand this case to the FMC with instructions that Interconex be afforded the opportunity to amend.

Respectfully submitted,

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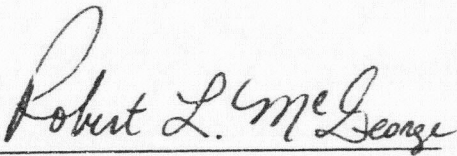
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December 2, 1977

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Petitioner, Interconex, Inc., was served upon each of the parties of record by first class mail, postage prepaid, this 2nd day of December, 1977.



Robert L. McGeorge